

D.L. Baker, Inc., t/a Baker Electric, and its alter ego and/or Successor Baker Electric, Inc., and Daniel L. Baker and Maggie Barry, Individually and International Brotherhood of Electrical Workers. Cases 5–CA–24131 and 5–CA–24190

January 19, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN
AND HURTGEN

On May 8, 1995, the National Labor Relations Board issued a Decision and Order in this proceeding¹ in which it ordered the Respondent, D.L. Baker, Inc., t/a Baker Electric, to offer reinstatement to Michael Tangy and to make him whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him, to offer employment to individuals on the Union's out-of-work list who were denied an opportunity to work for the Respondent due to the Respondent's failure and refusal to adhere to the NECA-Union Inside Wireman Master Agreement, and to make whole the Respondent's own employees and those who were unlawfully denied employment for all loss of earnings and other benefits they suffered as a result of the Respondent's failure to adhere to the agreement. On January 8, 1997, the United States Court of Appeals for the Fourth Circuit entered a judgment enforcing the Board's Order.²

A controversy having arisen over the amount of backpay due the claimants under the Board's Order, the Regional Director for Region 5 issued a compliance specification and notice of hearing setting forth backpay formulae and calculations for the three groups of claimants: employees who worked for the Respondent during the backpay period; individuals on the Union's out-of-work list who were not referred for employment due to the Respondent's failure to use the hiring hall; and discriminatee Tangy, who had been discharged for engaging in protected activities. The specification also alleges that three additional Respondents are derivatively liable for the amounts due the claimants. Specifically, the specification alleges that Respondent Baker Electric, Inc. is an alter ego and/or successor of D.L. Baker, Inc., t/a Baker Electric, and is jointly and severally liable for the backpay, interest, and other relief required by the Board's Order as enforced by the court. The specification further alleges that Daniel L. Baker and Maggie Barrie, individually, acted as the alter egos of Respondents D.L. Baker, Inc., t/a Baker Electric and Baker Electric, Inc. and that both individuals are personally liable, jointly and severally, for payment of backpay, interest, and other relief.

¹ 317 NLRB 335 (1995).

² *NLRB v. Baker Electric*, No. 96–1377 (4th Cir. 1997) (per curiam) (unpublished opinion).

All four Respondents filed answers to the compliance specification on April 21, 1999. The answers generally deny the General Counsel's formulae for computing backpay and the application of those formulae to the claimants. The Respondents additionally raise several affirmative defenses.

On May 11, 1999, the General Counsel filed with the Board a Motion for Partial Summary Judgment. The General Counsel argues that the Respondents' answers are substantively deficient under Section 102.56(b) of the Board's Rules and Regulations, because the Respondents' general denials to paragraphs 17, 18, 19, 24, and 32 relate to matters within the Respondents' knowledge. The General Counsel further argues that the Respondents' affirmative defenses are unsupported, and that the Respondents improperly seek to relitigate the Respondents' liability. The General Counsel urges the Board to strike the Respondents' answers to paragraphs 17, 18, 19, 24, and 32 in their entirety, or, alternatively, to grant summary judgment as to the allegations in those paragraphs.³

On May 18, 1999, the Board issued an order transferring proceedings to the Board and Notice to Show Cause why the General Counsel's motion should not be granted. On June 1, 1999, the Respondents filed a joint opposition to the General Counsel's motion and, in addition, filed joint motions to compel the return of original documents, for the production of certain information related to the compliance specification, and for an enlargement of time in which to file an amended answer to the compliance specification following production of the requested documents. The Charging Party filed a brief in support of the General Counsel's motion. The General Counsel filed a reply brief to the Respondents' joint opposition to his motion and an opposition to the Respondents' motions. The Respondents sought to file a surreply brief to the General Counsel's reply brief, which the Board's Executive Secretary rejected pursuant to the Board's longstanding policy against accepting surreply briefs. The Respondents then filed with the Board a motion to accept the surreply brief.⁴

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

³ The motion does not seek summary judgment with respect to alter ego or successor issues, interim earnings of hiring hall claimants or Tangy, claimants' medical expenses, or contractual funds payments.

⁴ Motions for Summary Judgment are governed by Sec. 102.24 of the Board's Rules and Regulations. Sec. 102.24(b) permits a party to file an opposition to the motion and a response to the Notice to Show Cause. In addition, although not expressly provided for in Sec. 102.24, it is the Board's practice to permit the party moving for summary judgment to file a reply brief, just as a party filing exceptions under Sec. 102.46 is permitted to file such a brief. See Sec. 102.46(h). In consideration of the need for administrative finality, however, surreply briefs are generally not permitted, "except by special leave of the Board." *Id.* Here, no circumstances were presented warranting special leave, and the Respondents' motion to file a surreply brief is therefore denied.

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

Section 102.56 of the Board's Rules and Regulations provides that:

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section and the failure so to deny is not adequately explained, such allegation shall be deemed to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

Having considered the matter, the Board has decided to grant the General Counsel's motion.⁵ With respect to

⁵ Based on the entire record, we find the Respondents' motions for return or production of documents to be without merit. The Respondents demand return of the original financial records subpoenaed during compliance proceedings. The General Counsel retained the originals of financial records to be introduced at the compliance hearing, in view of concerns about integrity of evidence that arose during protracted subpoena enforcement litigation. The General Counsel provided the Respondents with date stamped copies of all retained originals. The Respondents do not allege that the copies and the originals differ. To facilitate the return of the originals, the General Counsel made several efforts to authenticate copies for use at trial, all of which met with no success: the Respondents opposed the General Counsel's

the answer filed by the original Respondent, D.L. Baker, Inc., t/a Baker Electric, we find that it fails to raise any issue warranting a hearing with respect to those portions of the compliance specification on which summary judgment is sought. The general denials in the Respondent's answers to paragraphs 17, 18, 19, 24, and 32 of the compliance specification do not meet the requirements of Section 102.56 of the Board's Rules and Regulations. Paragraphs 17, 18, and 19 of the specification base gross backpay, interim earnings, and calendar quarter net backpay for the Respondent's own employees on the hours they actually worked for the Respondent during the backpay period and the wages they were actually paid, incorporating the increases provided in the Master Agreement. Paragraphs 24 and 32 use the same basis for determining gross backpay, but not interim earnings or net backpay, for the hiring hall claimants and for discriminatee Tangy. These matters, including the interim earnings of employees on the Respondent's payroll, involve information within the Respondent's knowledge and control. The Respondent's failure to set forth fully its position as to the applicable premises or to furnish appropriate supporting figures or alternative calculations to those alleged in paragraphs 17, 18, 19, 24, and 32 is contrary to the specificity requirements of Section 102.56 of the Board's Rules and Regulations.⁶

motion to reopen the record to authenticate copies, refused to stipulate to authenticity or to allow the Respondents' principals to swear to authenticity, and ignored the General Counsel's standing offer to the Respondents' counsel to review the originals at the Regional Office as needed. In addition, the Respondents' allegation that the General Counsel breached a district court order to return records is without foundation; the record does not contain such an order. We thus deny the Respondents' motion to compel return of original documents. The Respondents further moved for production of certain other documents related to the compliance specification. As the requested records are not relevant to matters on which summary judgment is sought, we deny the motion. Consequently, we also deny the Respondents' motion for enlargement of time to file an answer to the compliance specification, as that motion was predicated on receipt of the requested documents.

⁶ The Respondent argues that its answer should be considered sufficient under *Aquatech, Inc.*, 306 NLRB 975 (1991), and *Vibra-Screw, Inc.*, 308 NLRB 151 (1992). In those cases, the Board construed oppositions to summary judgment motions that cured procedural defects or provided new information as amended answers. Here, conversely, the Respondent's opposition contains no new information. Further, the Respondent's speculation that if it had additional documents it might produce more specific answers is baseless. We have found no merit in the Respondent's motions requesting the General Counsel to return or produce additional documents.

We need not decide the question of the adequacy of the answers filed by the three additional Respondents. Resolution of the derivative liability issue will necessarily resolve that question as well. If there is no merit in the successorship and alter ego allegations of the compliance specification, then these Respondents will not be liable for any backpay. If, on the other hand, the General Counsel establishes that such a relationship exists among the Respondents, then the additional Respondents will be bound by the failure of the original Respondent to provide an adequate answer to pars. 17, 18, 19, 24, and 32 of the compliance specification. See *Carib Inn Tennis Club & Casino*, 320 NLRB 1113, 1114 fn. 4 (1996), supplemented by 323 NLRB 591 fn. 5 (1997).

The Respondents also deny liability for the backpay period set forth in the compliance specification, including the allegations in paragraphs 17, 18, 19, 24, and 32, on the ground that the Respondent, D.L. Baker, Inc., t/a Baker Electric, repudiated the collective-bargaining agreement in September 1993, shortly after the backpay period commenced. In the underlying case, however, the Board and the court of appeals specifically found that the Respondent had never effectively repudiated the agreement.⁷ Thus, the Respondents' argument that backpay tolls in September 1993 has already been rejected and may not be relitigated in this proceeding. *Viola Industries*, 316 NLRB 424 (1995); *Arctic Framing, Inc.*, 313 NLRB 798 (1994).

Accordingly, pursuant to Section 102.56(c) of the Board's Rules, we deem the Respondent to have admitted the allegations of paragraphs 17, 18, 19, 24, and 32 of the compliance specification as to the gross backpay formula for all claimants and as to the interim earnings and calendar quarter net backpay formula for the Respondent's own employees, and we grant the General

Counsel's Motion for Partial Summary Judgment as to those matters.

ORDER

It is ordered that the General Counsel's Motion to the Board for Partial Summary Judgment is granted with respect to the compliance specification's paragraphs 17, 18, 19, 24, and 32 with respect to formulae and calculations of gross backpay for all claimants and interim earnings and calendar quarter net backpay for claimants who worked for Respondent D.L. Baker, Inc., t/a Baker Electric.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 5 for the purposes of issuing a notice of hearing and scheduling the hearing before an administrative law judge, which shall be limited to the taking of evidence concerning the remaining allegations of the compliance specification.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

⁷ 317 NLRB at 346; *NLRB v. Baker Electric*, unpublished opinion at 8. The compliance specification alleges that effective repudiation occurred on May 28, 1997, subsequent to the Board and court orders, and adopts that date as the termination of the backpay period.